No. 80-1228

APR 13 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LOUIS S. BULLARD
SPECIAL AGENT, FBI,

Petitioner,

v.

WILLIAM H. WEBSTER
DIRECTOR, FBI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER TO THE MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Louis S. Bullard
Pro Se
P.O. Box 1315
Pittsburgh, PA 15230
(412) 471-2000

TABLE OF CONTENTS

Cases:	Page(s)
Ashton v. Civiletti, 613 F. 2nd 923 (D.C.C. 1979)	7, 13
Board of Regents v. Roth, 408 U.S. 564 (1972)	7, 8, 11
Bramley v. Webster, 476 F. Supp. 351 (Ed. Pa. 1979)	12
Carey v. Piphus, 55 L ED 2d 252	13
Delong v. U.S., 621 F. 2nd, 619 (1980)	14
Dunlop v. Bachowski, 421 U.S. 560 (1974)	2
Johnson v. Bergland, 586 F. 2nd 993 (1978)	14
Keane v. Berry, 416 F. Suppl 858 (1976)	13
Kizas v. Webster, Civil No. 78-983 (D.C. 1980)	8
Kletschka v. Driver, 411 F. 2d 436 (2nd Circuit 1969)	12
Sheehan v. Army and Air Force Exchange Service, 618, F. 2nd 1132 (CA 5 June, 1980).....	8

Page(s)

Constitution, Statutes and FBI Regulations:

United States Constitution First Amendment 2, 3, 13

United States Constitution Fifth Amendment 2, 13

Privacy Act of 1974, 5 USC 552a 3, 7, 13

Administrative Procedures Act, 5 USC 701-706 ..... 2, 13

5 USC 7501 13

5 USC 7511 13

28 USC 536 13

FBI Manual of Administrative Operations (MAOP) Regulations, Part I, Section II, et. seq. Regarding OP Transfers 8, 9, 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1228

LOUIS S. BULLARD
SPECIAL AGENT, FBI

Petitioner,

v.

WILLIAM H. WEBSTER
DIRECTOR, FBI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER TO THE MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, a Special Agent Accountant of the Federal Bureau of Investigation (FBI), contends that the District Court was correct in concluding:

(1) that the decision by the FBI to transfer him was arbitrary and capricious and made without any evidence and was additional punishment for protesting a suspension in violation of the U.S. Constitution Amendment I and 5 USC 701 et. seq., and as such was an abuse of discretion not protected by 5 USC 701(a) (2), as clearly set forth in this court's decision in Dunlop v. Bachowski, 421 US 560 (1974) (Pet. 7-9, 20); (2) that the disciplinary transfer deprived Petitioner of a valuable cognizable property right to an earned office of preference through seniority, in violation of the Fifth Amendment to the U.S. Constitution; (3) that the transfer was retaliation for Petitioner's strongly worded teletype of protest sent after notification of a five day suspension received two months after the alleged "loss of effectiveness" incident

in violation of the First Amendment right to responsible protected speech and; (4) that the transfer was based on inaccurate and untrue information in violation of 5 USC 552a, in that the Acting Special Agent in Charge in Jackson stated his reason for Petitioner's "loss of effectiveness" was that other agents had said they would not work with Petitioner when, in fact, no such remark or statement was ever made, which was brought out in the District Court below.

Petitioner also contends that the Court of Appeals erred in concluding that the FBI has no internal regulations granting an office of preference based on seniority which would comprise a cognizable property interest, and also that Petitioner could point to no regulatory provision indicating any entitlement which regulations and policies were contained in

Petitioner's internal appeal to the FBI Director, which was an exhibit in the record in the District Court and available to the Court of Appeals and apparently overlooked.

In any event, the official FBI internal regulations regarding office of preference (OP) transfers are set forth below.

1. From December, 1956, to January, 1968, Petitioner was assigned to FBI offices at FBIHQ (twice); Washington Field Office (twice); Quantico, Virginia; Albany, New York; San Juan, Puerto Rico; New York City, New York; and finally received his OP in January, 1968, to Gulfport, Mississippi, where he remained assigned until the "loss of effectiveness" transfer to Newark, New Jersey, on January 17, 1978, a decade after achieving his OP.

Judicial action prevented the transfer

thereafter until March 18, 1981.

At no time had Petitioner "lost his effectiveness" at Gulfport and he continued to perform his duties as a Special Agent of the FBI, Gulfport, Mississippi, from November, 1977 (the time of the incident) through March, 1981, approximately three and one-half years without further incident.

Respondent fails to advise this court that the witness being guarded was accompanied at all times by her 17 year old brother and two minor children and suggests that Petitioner was lying down (fully clothed) next to the witness on her bed, which reads like a cheap novel, when in fact, Petitioner was sitting against the headboard of the bed watching TV.

The witness's brother was on the other bed, also watching TV. The chairs in the room could not be used as they were filled with dirty dishes from several meals.

Petitioner drove home in a Government vehicle without incident, and was not drunk.

On December 5, 1980, the Newark transfer was amended from Newark to Pittsburgh for "official reasons," another non-OP.

The District Court found that the Newark transfer was a further punitive measure and therefore set it aside as arbitrary and capricious.

2. At a hearing on the question of whether an injunction should issue in March, 1978, it was determined that there was no information in the administrative record to support the Acting Special Agent in Charge's conclusion that Petitioner had "lost his effectiveness" because other agents had said they could not work

with him. This type of situation is exactly why the provisions of the Privacy Act of 1974 (5 USC 552a (g) (3) (B) were enacted by Congress to prevent loss of a benefit (such as an OP) based on inaccurate and untrue information and also provided for payment of attorney's fees to the prevailing party.

Petitioner testified that he and all Agents, when first entering on duty, had agreed to assignment anywhere and at any time and that they could not expect an office of preference AT THE BEGINNING OF THEIR CAREERS (emphasis added); however, all beginning agents were told at the outset that this policy was modified by a written OP policy based on seniority, which constitutes much more than an implied-in-fact contract between the FBI and its agents. See Ashton v. Civiletti, 613 F. 2nd 923 (D.C.C. 1979); Board of

Regents v. Roth, 408 US 564 (1972); Kizas v. Webster, Civil No. 78-983 (D.C. 1980), which recognized a contractural preference within the FBI for clerical employees having college degrees to be given a preference for the Agent's position, which constituted a cognizable property interest. See also Sheehan v. Army and Air Force Exchange Service, 619 F. 2d 1132 (CA 5 June, 1980).

The official FBI Office of Preference Transfer Policy is found in its Manual of Administrative Operations (MAOP) as follows:

"Part I, Section 11, Transfers

11-8 SPECIAL AGENT OFFICE OF PREFERENCE (OP) TRANSFER

11-8.1 General

(1) The OP system was established in order to provide a means to reward Agents for faithful service by sending them to

"an office of their choice. This system is based generally upon SENIORITY (emphasis added), consistent with the needs of their service and budgetary considerations. If an Agent receives an OP transfer, that Agent will not be considered for another OP for five years.

(2) Agents are cautioned to keep their listed OP current. As a reminder, each office will receive semiannually a printout listing each Agent assigned to that office and his/her respective OP. This printout should be reviewed by all Agent personnel for accuracy. To change an OP, the Agent must submit form FD-314.

11-8.2 OP Transfer Policy - New York Office

Agents assigned to the New York Office in excess of five years and who are not in their office of preference will be given every possible consideration for

"transfer to their OP. New York Office Agents will be given priority consideration for an OP transfer over other Agents providing there is no substantial difference in the lengths of Bureau service.

11-8.3 OP Transfer Policy - San Juan Office

Agents assigned to the San Juan Office for five years of continuous service will be given every consideration for a transfer to an office of their preference, consistent with the needs of the service."

Further evidence of the FBI Director's concern about FBI OP Policy was revealed in a recent printed, nine-page document dated February 23, 1981, which read, in part, as follows:

"A Message to All FBI Employees from Director William H. Webster

"I write to you as I begin my fourth year as Director ***

'In planning for 1981, I have asked our executives to give special emphasis to the needs of our employees, to reexamine old policies and programs which may be creating unnecessary hardships in these times and to recommend changes, including legislative changes, which would improve the quality of life in the Bureau.'***

'Transfers. Concern was expressed that Office of Preference transfers may be unevenly applied *** THE OFFICE OF PREFERENCE POLICY***MUST NOT BE SUBVERTED BY INTERNAL POLICIES.'" (Emphasis added).

Clearly, the above written regulations and policy establish a cognizable property interest in an OP which is completely ignored by respondent. (Mem. Opp. Pages 3, 5). Board of Regents v. Roth, 408 U.S. 564, 577 (1972), obviously, agents of the FBI in their senior years rely on the Office of Preference

Policy which is written, expressed and implied, and is more than an understanding, in their daily lives as do their families for a sense of security as regards field agents in their residence who are not interested in administrative advancement, which by its nature entails transfers.

The cases cited by Respondent as being consistent with the holding of the Fifth Circuit Court of Appeals is misplaced (Mem. Opp. Pages 4, 5). Bramley v. Webster, 476 F. Supp. 351 (Ed. Pa. 1979) has no disciplinary aspect and Kletschka v. Driver, 411 F. 2d 436 (2nd Circuit 1969) was remanded to the District Court for a hearing on a ground of a constitutional violation of freedom of speech.

Other courts have held that the Government must follow constitutional principles even if their regulations do not.

Keane v. Berry, 416 F. Supp. 858 at 859 (1976).

The proposition that FBI Agents are part of the "excepted service" (28 US 536) only excepts them from 5 USC 7501(a) (competitive civil service) and 5 USC 7511 et. seq. if they happen not to be veterans, and does not except them from 5 USC 702 et. seq. and 5 USC 552 and 552(a) et. seq., and certainly not from the First and Fifth Amendments to the U.S. Constitution.

The question of "excepted service" has already been treated in Ashton v. Civiletti, F. 2nd 923 (D.C.C. 1979) where it was decided that "excepted service" status does not deprive FBI employees of procedural due process. See also Carey v. Piphus, 55 L Ed 2d 252, where this court said that the right to procedural due process is "absolute."

More recent cases have found that transfer and other personnel actions involving Federal employees may not be based on protected speech. Delong v. U.S., 621 F. 2nd 618 (1980) at 624. See also Johnson v. Bergland, 586 F. 2nd 993 (1978).

Consequently, it is respectfully submitted that the petition for writ of certiorari should be granted.

Louis S. Bullard
Pro Se

April, 1981